Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

JANIET L. HEYWARD, STAFF SERGEANT,
UNITED STATES AIR FORCE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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October 1994

33 pp

QUESTIONS PRESENTED

Whether the Military Judge's denial of a continuance requested by petitioner to secure an exculpatory polygraph test violated petitioner's rights under the United States Constitution Sixth Amendment Compulsory Process Clause and the United States Constitution Fifth Amendment Due Process Clause.

Whether Military Rule of Evidence 707's ban on the admission of polygraph results is a denial of petitioner's United States Constitution Sixth Amendment right to compulsory process and petitioner's United States Constitution Fifth Amendment Right to Due Process of Law.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	5
CONCLUSION	13
APPENDIX A (27 July 1994 Order of the United States Court of Military Appeals)	1a
APPENDIX B (18 October 1993 Decision of the United States Air Force Court of Military Review)	2a
APPENDIX C (22 June 1993 Order of the United States Court of Military Appeals)	9a
APPENDIX D (23 September 1992 Decision of the United States Air Force Court of Military Review)	11a

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES: Page

Barefoot v. Estelle, 463 U.S. 880 (1983) 10
California v. Trombetta, 467 U.S. 479 (1984) 8
Chambers v. Mississippi, 410 U.S. 284 (1973) 8
Hawkins v. United States, 358 U.S. 74 (1958) 13
In Re Oliver, 333 U.S. 257 (1948) 8
Rock v. Arkansas, 483 U.S. 44 (1987) 9, 10
Taylor v. Illinois, 484 U.S. 408 (1988) 8
Ungar v. Sarafite, 376 U.S. 575 (1964) 6
United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) 8
Washington v. Texas, 388 U.S. 14 (1967) 8, 9

FEDERAL CASE:

United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989) 9, 13

MILITARY CASES:

United States v. Andrews, 36 M.J. 922 (A.F. C.M.R. 1993) 5, 6, 7
United States v. Browers, 20 M.J. 356 (C.M.A. 1985) 6
United States v. Fortner, 37 M.J. 349 (C.M.A. 1993) 7
United States v. Fergason, 6 M.J. 844 (N.M. C.M.R. 1979) 6
United States v. Gipson, 24 M.J. 246 (C.M.A. 1987) 11, 12
United States v. Heyward, ACM S28688 (f. rev.), unpub. (A.F.C.M.R. 18 October 1993), *aff'd*, ____ M.J. ____ (C.M.A. 1994) 1, 3, 4, 5, 7
United States v. Heyward, ACM S28688, unpub. (A.F.C.M.R. 13 September 1982), *set aside and remanded*, 38 M.J. 226 (C.M.A. 1993) 1, 3
United States v. Keys, 29 M.J. 920 (A.C.M.R. 1989) 6

CASES – Continued: Page

United States v. Maresca, 28 M.J. 328 (C.M.A. 1989) 6
United States v. McKinnie, 29 M.J. 825 (A.C.M.R. 1989), *aff'd on other grounds*, 32 M.J. 141 (C.M.A. 1991) 12
United States v. Menoken, 14 M.J. 10 (1982) 5
United States v. Peel, 29 M.J. 235 (C.M.A. 1989) .. 10
United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988) 5
United States v. West, 27 M.J. 223 (C.M.A. 1988) . 12
United States v. Williams, 39 M.J. 555 (A.C.M.R. 1994) 10, 13

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V 2, 5, 6, 8, 12, 13, 14
U.S. Const. amend. VI 2, 5, 6, 8, 12, 13, 14

UNITED STATES STATUTES:

10 U.S.C.A. Section 867a (West Supp. 1994) 2
28 U.S.C.A. Section 1259(3) (West 1993) 2

UNIFORM CODE OF MILITARY JUSTICE:

Article 40, 10 U.S.C. Section 840 (1988) 5
Article 67(a)(2), 10 U.S.C.A. Section 867(a)(2) (1988) 13
Article 112a, 10 U.S.C. Section 912a (1988) 2

MILITARY RULES OF EVIDENCE:

Military Rule of Evidence 401 12
Military Rule of Evidence 402 12
Military Rule of Evidence 403 12
Military Rule of Evidence 702 ..... 9, 12
Military Rule of Evidence 707 ..... 4, 5, 11, 12
Military Rule of Evidence 707(a) 5, 8, 10, 13, 14

OTHER AUTHORITY: Page

Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991) 11

Halbleib, *United States v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System,* 80 Kentucky L.J. 225 (1992) 10

McCormack, *McCormack on Evidence* (3d ed. 1984) 9

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No.

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v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Janiet L. Heyward, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Military Appeals entered in her case on 27 July 1994.

OPINIONS BELOW

The 27 July 1994 order of the United States Court of Military Appeals, *United States v. Heyward,* ____ M.J. ____ (C.M.A. 1994) is reprinted at Appendix A. The unpublished decision of the United States Air Force Court of Military Review, *United States v. Heyward,* ACM S28688 (f. rev.), unpub. (A.F.C.M.R. 18 October 1993), *aff'd,* ____ M.J. ____ (C.M.A. 1994) is reprinted at Appendix B. The 22 June 1993 order of the United States Court of Military Appeals, 38 M.J. 226 (C.M.A. 1993), is reprinted at Appendix C. The 23 September 1992 unpublished decision of the United States Air Force Court of Military Review, *United States v. Heyward,* ACM S28688, unpub. (A.F.C.M.R. 1992), *set aside and remanded,* 38 M.J. 226 (C.M.A. 1993), is reprinted at Appendix D.

JURISDICTION

The order of the United States Court of Military Appeals was entered on 20 July 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1259(3) (West 1993) and 10 U.S.C.A. Section 867a (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Sixth Amendment of the Constitution of the United States provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

STATEMENT OF THE CASE

Petitioner was charged with wrongful use of marijuana at or near Bexar County, Texas on divers occasions from on or about 1 December 1989 to on or about 23 January 1993, in violation of Article 112a of the Uniform Code of Military Justice, 10 U.S.C. Section 912a (1988).[1] She was convicted[2] by a special court-martial composed of a mili-

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[1] Petitioner was also charged with dereliction of duties as a non-commissioned officer from on or about 1 December 1989 to on or about 23 January 1992, by willfully allowing herself to inhale marijuana smoke in her proximity in such amount that her urine sample would test positive. *See* DD Form 458. The Military Judge found her not guilty of this charge and specification pursuant to defense motion. *See* R. 87.

[2] Pursuant to defense motion, the Military Judge struck "on divers occasions" from the specification and amended the charged time "from on or about 1 December 1989" to "from on or about 23 December 1991". *See* R. 87-89.

tary judge sitting alone and sentenced to a bad conduct discharge and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged. The United States Air Force Court of Military Review affirmed the findings and sentence in an unpublished decision dated 23 September 1992. *See United States v. Heyward,* ACM S28688, unpub. (A.F.C.M.R. 23 September 1992), *set aside and remanded,* 38 M.J. 226 (C.M.A. 1993) and Appendix D. Petitioner petitioned the United States Court of Military Appeals for a grant of review of the decision of the United States Air Force Court of Military Review. By order dated 22 June 1993, the United States Court of Military Appeals set aside the decision of the United States Air Force Court of Military Review and remanded the case to the United States Air Force Court of Military Review for consideration of issues similar to the issues raised before this Court. *See* 38 M.J. 226 (C.M.A. 1993) and Appendix C. On 18 October 1993 the United States Air Force Court of Military Review again affirmed the findings and sentence in an unpublished opinion. *See United States v. Heyward,* ACM S28688 (f. rev.), unpub. (A.F.C.M.R. 18 October 1993), *aff'd,* ____ M.J. ____ (C.M.A. 1994), hereinafter cited as *Heyward III*) and Appendix B. Petitioner petitioned the United States Court of Military Appeals for review of the decision of the United States Air Force Court of Military Review. In an order dated 27 July 1994, the United States Court of Military Appeals granted petitioner's petition for review and summarily affirmed the decision of the United States Air Force Court of Military Review. *See* ____ M.J. ____ (C.M.A. 1994) and Appendix A.

Petitioner provided a urine sample in a random urinalysis on 23 January 1992 which tested positive for the metabolites of marijuana. *Heyward III* at 2. Petitioner was interviewed by AFOSI (Air Force Office of Special Investigations) agents, denied using marijuana, and agreed to take a

polygraph examination. *Id.* On 21 February 1992 petitioner took the polygraph examination. *Id.* After finishing two series of questions, the polygrapher expressed the opinion that petitioner was not lying when she denied "purposely" using marijuana while in the United States Air Force. *Id.* Charges were preferred against petitioner on 30 March 1992 and referred to a special court-martial on 1 April 1992. *Id.* An initial trial date of 17 April 1992 was set. *Id.* On 16 April 1992, the United States requested a delay in the proceedings until 29 April 1992. *Id.* The delay request was granted. *Id.*

Petitioner requested the director of the DoD Polygraph Institute to review the results of her examination. *Id.* On 23 April 1992 trial defense counsel was notified by AFOSI that petitioner's polygraph results had been invalidated by the DoD Polygraph Institute and HQ AFOSI because of " 'an improper comparison of a test question to a control question.' " *Id.* An AFOSI polygrapher offered to retest petitioner at 0800 on 24 April 1992. *Id.* Petitioner's trial defense counsel declined the offer because of a scheduling conflict with a hearing in another case. On 27 April 1992 trial defense counsel requested a delay in the trial from 29 April 1992 to 6 May 1992 so that another polygraph examination could be performed. *Id.* Trial defense counsel acknowledged Military Rule of Evidence 707 (which excludes results of a polygraph examination and related matters from admission) but asserted that the rule was unconstitutional. *Id.* The United States opposed the request based on the inadmissibility of polygraph evidence. *Id.* The Military Judge denied the defense delay request. *Id.*

Petitioner renewed her request for a continuance at trial. *Id.* Trial defense counsel made an offer of proof in which she which she explained her intent to contest the constitutionality of M.R.E. 707 and explained why she needed a continuance. *Id.* Trial defense counsel explained that she refused the AFOSI offer of the 24 April 1992 polygraph because she had a pretrial confinement hearing

scheduled at another installation and because she was unsure whether she would have adequate opportunity to fully discuss the issue with her client. *Id.* at 2-3. The Military Judge denied the request for a continuance on the basis of M.R.E. 707. *See* R. 21. At trial petitioner took the stand and denied knowingly using marijuana. *See* R. 122.

REASON FOR GRANTING THE WRIT

CONSIDERATION OF THIS CASE WILL GIVE THIS HONORABLE COURT THE OPPORTUNITY TO ADDRESS THE CONSTITUTIONALITY OF MILITARY RULE OF EVIDENCE 707(a), WHICH *PER SE* EXCLUDES POLYGRAPH RESULTS FROM COURTS-MARTIAL AND VIOLATES PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND WHICH THREATENS THE FIFTH AND SIXTH AMENDMENT RIGHTS OF THE MILLIONS OF SERVICEMEMBERS IN THE UNITED STATES ARMED FORCES.

A Military Judge may grant a continuance for a reasonable cause to any party for such time, and as often as may appear just. Article 40, U.C.M.J., 10 U.S.C. Section 840 (1988); *United States v. Andrews,* 36 M.J. 922, 924 (A.F.C.M.R. 1993). A purpose of the continuance to is allow counsel for both sides to prepare for trial. *Andrews,* 36 M.J. at 924. The Military Judge is responsible for prejudice that may result to an accused and should err on the side of granting a delay on a showing of good cause. *Id.* at 926. The standard of review for a Military Judge's decision to deny a continuance is abuse of discretion. *United States v. Sullivan,* 26 M.J. 442, 443 (C.M.A. 1988); *United States v. Menoken,* 14 M.J. 10, 11 (1982). "A military judge's decision to grant or deny a continuance is a matter of discretion, based upon facts and circumstances then

and there existing." *United States v. Maresca* 28 M.J. 328, 333 (C.M.A. 1989). *See United States v. Browers,* 20 M.J. 356, 360 (C.M.A. 1985). Whenever an accused's request for a continuance is based on a substantial right, mere administrative inconvenience to the prosecution is not a sufficient ground for denying the request. *See Andrews,* 36 M.J. at 926; *United States v. Keys,* 29 M.J. 920 (A.C.M.R. 1989). *See also United States v. Fergason,* 6 M.J. 844 (N.M.C.M.R. 1979) (request for continuance so accused could be represented by individual military counsel). "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964) (citations omitted).

This case was originally set for trial on 17 April 1992. On 16 April 1992, the United States submitted a delay request so that a circuit trial counsel could represent the United States. *See Allied Papers, Request for Delay- United States v. Heyward,* dated 16 April 1992. The Military Judge granted a twelve day delay. *Id.* On 27 April 1992, two days before trial, the defense requested a seven day delay so that a second polygraph could be performed on petitioner. *See Allied Papers, Request for Delay- U.S. v. Heyward,* dated 27 April 1992. Trial Counsel's indorsement opposed the delay, and the Military Judge denied the request. *See id.* Trial defense counsel renewed her request for delay at trial and fleshed out the full reasons for the request. *See* R. 9-10. The Military Judge denied the motion, but set forth findings of fact for appeal. *See* R. 14-22.

Petitioner's request for delay was based on substantial rights—her rights under the Fifth and Sixth Amendments of the United States Constitution to present evidence on her behalf. There was no evidence before the court that the delay was requested for an improper purpose. The fact that petitioner had passed an earlier polygraph, in the opinion of the polygrapher, indicates that the possiblity of obtaining an exculpatory polygraph was more than mere

speculation. The trial court made no findings that a delay was not feasible in light of the court schedule, the schedules of the parties, or any other reason. And the court had granted the United States an earlier, twelve day delay which had been requested one day prior to the original trial date.

Comparison between the instant case and *United States v. Andrews,* 36 M.J. 922 (A.F.C.M.R. 1993) in instructive. In *Andrews* the accused asked for a delay of ten to fourteen days which delay was denied after a delay previously granted to the United States. "The prosecution opposed the delay but offered no reasons other than administrative inconvenience and its general disagreement that a delay was needed." *Andrews,* 36 M.J. at 926. The United States Air Force Court of Military Review held that the Military Judge abused his discretion in denying the defense request for a continuance and set aside the findings and sentence. *See id.* at 926-927.

In affirming petitioner's conviction, the United States Air Force Court of Military Review implicitly found that trial defense counsel's decision not to allow petitioner to take the polygraph examination in her absence was unreasonable. *See Heyward III* at 2-3. Trial defense counsel had a prior commitment for a pretrial confinement hearing. *See* R. 16. Trial defense counsel's decision not to allow her client to attend the polygraph alone was a reasonable decision. In *United States v. Fortner,* 37 M.J. 349 (C.M.A. 1993), counsel allowed his client to take an unaccompanied polygraph after receiving verbal and written assurances that no post-polygraph conversations would take place. On cross-examination of Fortner the trial counsel questioned Fortner about a comment made by the polygrapher to Fortner after the examination. *Id.* at 350. The United States Court of Military Appeals failed to find prejudice or plain error. *See id.* at 351.

The Military Judge's denial of petitioner's request for a reasonable continuance denied petitioner's rights under the Fifth and Sixth Amendments of the United States Constitution and was an abuse of the Military Judge's discretion.

"Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." M.R.E. (Military Rule of Evidence) 707(a). "No person shall be . . . deprived of life liberty, or property, without due process of law . . . ." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall enjoy the right. . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend. VI. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts." *Washington v. Texas,* 388 U.S. 14, 19 (1967). The accused has the right to call witnesses whose testimony is material and favorable to his defense. *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982).

In sum, the foregoing provisions require that an accused be given a "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). The accused must be given a fundamentally fair trial in which he is given "an opportunity to be heard in his defense—a right to his day in court." *In Re Oliver,* 333 U.S. 257, 273 (1948). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois,* 484 U.S. 400, 408 (1988); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973).

The Court has looked with disfavor on *per se* exclusionary rules when the effect of such rules is to deny an accused the right to present relevant, probative evidence in

his defense. "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use." *Washington v. Texas,* 388 U.S. 14, 23 (1967) (reversing the conviction of the accused who had been precluded from offering the testimony of a coactor under Texas statutes barring the testimony of co-participants in the same crime if the coactor is called as a witness by the accused). Restrictions on the defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. *Rock v. Arkansas,* 483 U.S. 44, 55-56 (1987). In applying evidentiary rules, the sovereign must determine whether the interests advanced by the rules justify the limitations placed on defendants' rights. *See id.* at 56. "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Id.* at 61 (emphasis in original).

As Professor McCormick has noted, concerns about reliability "are not sufficient to warrant a rigid exclusionary rule. A great deal of lay testimony routinely admitted is at least as unreliable and inaccurate, and other forms of scientific evidence involve risks of instrumental or judgmental error." McCormick, *McCormick on Evidence* Section 206 at 629 (3d. ed. 1984), quoted in *United States v. Piccinonna,* 885 F.2d 1529, 1533 (11th Cir. 1989). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Military Rule of Evidence 702. Any individual who has knowledge in a field which exceeds the knowledge of the typical court member might be qualified as an ex-

pert. *See United States v. Peel,* 29 M.J. 235, 241 (C.M.A. 1989). Other testimony of certainly no greater reliability than polygraph results are uniformly admitted into evidence at courts-martial, e.g., psychiatric testimony. This Court has noted the poor predictive powers of psychiatric testimony. *See Barefoot v. Estelle,* 463 U.S. 880, 927-28 (1983) (Marshall, J., dissenting) ("[p]sychiatric predictions of future dangerousness *are not accurate*; wrong two times out of three, their probative value, and therefore any possible contribution they might make to the ascertainment of truth, is virtually nonexistent.") (emphasis in original). This Court held that a state may not *per se* exclude hypnotically refreshed testimony (*see Rock v. Arkansas,* 483 U.S. 44 (1987)), which is likely less reliable testimony than polygraph testimony. *See* Halbleib, *United States v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System,* 80 Kentucky L.J. 225, 251 (1992).

The effect of Military Rule of Evidence 707(a) on an accused's rights to present evidence on his behalf was considered by the United States Army Court of Military Review in *United States v. Williams,* 39 M.J. 555 (A.C.M.R. 1994). The court noted:

> This rule effectively removes any discretion from a military judge to weigh the legal and logical relevance of polygraph evidence. [footnote omitted] It denies a proponent an opportunity to even attempt to lay a foundation for admitting polygraph evidence, regardless of whether it is reliable, relevant, helpful, and even if its probative value outweighs any extraneous factors.

Id. at 557. The court noted that the rule "represents a dramatic shift from prior military precedent." *Id.* (The exclusion of M.R.E. 707(a) was incorporated into military

law with Change 5 to the Manual for Courts-Martial, United States, 1984.[3])

In a case which preceded Change 5 to the Manual for Courts-Martial, *United States v. Gipson,* 24 M.J. 246 (C.M.A. 1987), the United States Court of Military Appeals addressed the admissiblity of polygraph evidence. The accused moved at trial for the admission of an exculpatory polygraph which he secured at his own expense. *Id.* at 247. The United States moved for admission of the testimony of a Naval Investigative Service polygrapher who examined the accused and concluded he was deceptive in answering relevant questions. *Id.* The Military Judge ruled that neither party would be allowed to attempt to lay a foundation or admit polygraph evidence. *Id.*

The Court of Military Appeals noted:

> In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. . . . [W]e do not suggest that all polygraph evidence is admissible or that this particular evidence should have been admitted. [footnote omitted] Appellant still bears the burden of establishing the foundational predicates outlined above. Our holding here is only that appellant was entitled to attempt to lay that foundation.

Gipson, 24 M.J. at 253.

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[3] Change 5 is dated 15 November 1991. M.R.E. 707 is applicable only to cases in which arraignment was completed on or after 6 July 1991. Change 5 incorporates Executive Order No. 12767, dated 27 June 1991, published at 56 Federal Register 30284.

The United States Court of Military Appeals reiterated its *Gipson* ruling in *United States v. West,* 27 M.J. 223, 225 (C.M.A. 1988), stating "polygraph results must be evaluated under the entire spectrum of evidentiary rules." "[T]he question [is] whether the evidence is relevant under Mil.R.Evid. 401 and 402, whether the evidence is helpful to the factfinder within the meaning of Mil.R.Evid. 702, and whether its probative value outweighs collateral dangers in accordance with Mil.R.Evid. 403." *United States v. McKinnie,* 29 M.J. 825, 827 (A.C.M.R. 1989), *aff'd on other grounds,* 32 M.J. 141 (C.M.A. 1991).[4]

The United States Army Court of Military Review held that the total ban on polygraph evidence violated the Fifth and Sixth Amendments of the United States' Constitution.

> As the *Gipson* court noted, however, there is no right to present evidence—however much it purports to exonerate the accused—unless it is shown to be relevant and helpful. But the question of whether these findings were reliable, relevant, or helpful was, by virtue of Mil.R.Evid. 707, never addressed. The rule simply removes judicial discretion from this critical step in the evidentiary process. We hold under the facts of this case that appellant's Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard on these foundational matters, and allows for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of Mil.R.Evid. 707.

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[4] M.R.E. 401 defines relevant evidence. M.R.E. 402 states that relevant evidence is generally admissible and that irrelevant evidence is inadmissible. M.R.E. 403 states that relevant evidence may be excluded on grounds of prejudice, confusion, or waste of time. M.R.E. 702 involves expert testimony.

Williams, 39 M.J. at 558.[5]

The Eleventh Circuit Court of Appeals has held that polygraph evidence is not *per se* inadmissible. *See United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989). The court noted:

> The advent of new and development technologies calls for flexibility within the legal system so that the ultimate ends of justice may be served. It is unwise to hold fast to a familiar rule when the basis for the rule ceases to be persuasive. We believe that the science of polygraphy has progressed to a level of acceptance sufficient to allow the use of polygraph evidence in limited circumstances where the danger of unfair prejudice is minimized.

Id. at 1537.

As Justice Stewart observed, "[a]ny rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring). Military Rule of Evidence 707(a) is an arbitrary exclusionary rule which is overly broad in deterring the evil it was created to deter (unreliable evidence) and is an unconstitutional limitation on petitioner's Fifth and Sixth Amendment rights.

CONCLUSION

Petitioner had a Fifth and Sixth Amendment right to attempt to introduce exculpatory polygraph evidence. Petitioner demonstrated a bona fide need for a continuance to get an exculpatory polygraph and demonstrated a substantial possibility in fact of producing an exculpatory poly-

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[5] The Judge Advocate General of the Army has certified the *Williams* case to the United States Court of Military Appeals. USCMA Dkt. No. 94-5006/AR. *See* Article 67(a)(2), U.C.M.J., 10 U.S.C. Section 867(a)(2)(1988).

graph, based on the result of the AFOSI administered polygraph. Petitioner's reasonable request for a continuance was unreasonably and unjustifiably denied. The Military Judge abused his discretion in denying petitioner's request for a continuance. Military Rule of Evidence 707(a) is an arbitrary exclusionary rule which deprived petitioner of her United States Constitution Fifth and Sixth Amendment rights to present evidence on her behalf, and which potentially threatens the United States Constitution Fifth and Sixth Amendments rights of millions of servicemembers serving in the United States Armed Forces.

Respectfully submitted,

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October 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 93-0089/AF
CMR Dkt. No. S28688

UNITED STATES, APPELLEE

v.

JANIET L. HEYWARD (267-33-8790), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, it is by the Court this 27th day of July, 1994,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (PARKS)
Appellate Government Counsel (PETERSON)

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM S28688 (f rev)

UNITED STATES

v.

STAFF SERGEANT JANIET L. HEYWARD FR267-33-8790
UNITED STATES AIR FORCE

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18 October 1993

Sentence adjudged 30 April 1992 by SPCM convened at Kelly Air Force Base, Texas. Military Judge: Wade B. Morrison (sitting alone).

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Terry J. Woodhouse, Lieutenant Colonel Jay L. Cohen, and Captain Robert A. Parks.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Lieutenant Colonel Thomas E. Schlegel, and Captain Jane M.E. Peterson.

Before

JOHNSON, HEIMBURG, and YOUNG
Appellate Military Judges

OPINION OF THE COURT UPON FURTHER REVIEW

YOUNG, Judge:

On 29 and 30 April 1992, a military judge, sitting as a special court-martial, convicted appellant of wrongfully using marijuana and sentenced her to a bad-conduct discharge and reduction to E-1. The case was sent to this court without assignment of error and, on 23 September 1992, we affirmed the findings and sentence. For the first time, before the Court of Military Appeals, appellant raised two issues: 1) Whether the total ban on the admission of polygraph evidence (Mil. R. Evid. 707) violated appellant's right to due process; and 2) whether the military judge's decision to deny appellant's request for continuance based solely upon Mil. R. Evid. 707 deprived appellant of exculpatory evidence which could have been effectively used outside the trial forum. On 22 June 1993, the Court of Military Appeals set aside our prior decision and ordered this Court to reconsider the case in light of the two issues raised by appellant. Upon further consideration, we affirm.

I. Facts

On 23 January 1992, as part of a random urinalysis inspection, appellant provided a urine sample which tested positive for the presence of metabolites of marijuana. Appellant was interviewed by agents of the Air Force Office of Special Investigations (AFOSI), denied using marijuana, and consented to a polygraph. On 21 February 1992, appellant took an AFOSI polygraph exam. After completing two series of questions, the polygrapher opined that appellant was not deceptive when she denied ever "purposely" using marijuana while in the Air Force. Nevertheless, charges were preferred against appellant on 30 March 1992 and referred to a special court-martial on 1 April 1992. An initial trial date of 17 April was set. Pur-

suant to a 16 April government request, the military judge granted a delay until 29 April when circuit trial counsel would be available. To assist in challenging the constitutionality of Mil. R. Evid. 707, and with a view to obtaining a defense witness, appellant apparently requested the director of the DoD Polygraph Institute to review her exam results. On 23 April 1992, appellant's counsel was notified by AFOSI that the polygraph results had been invalidated by the DoD Polygraph Institute and HQ AFOSI because of "an improper comparison of a test question to a control question." The AFOSI polygrapher offered to retest appellant at the only time available prior to 4 May—0800 on 24 April. Appellant's counsel declined the offer. On 27 April, 4 days after notification of the invalidity of the polygraph exam and 2 days before trial, appellant's counsel requested a delay in the trial from 29 April until 6 May so that another polygraph exam could be performed. In the request, appellant's counsel acknowledged Mil. R. Evid. 707, but specifically noted her belief that the rule was unconstitutional. The trial counsel opposed the request based on the inadmissibility of polygraph evidence. The military judge denied the request.

At trial, appellant renewed her request for a continuance until 4 May so she could take another polygraph exam. Appellant produced no evidence on the issue, but made what can be described as an offer of proof in which her counsel explained her intent to contest the constitutionality of Mil. R. Evid. 707 and why that was not possible without a continuance. The military judge asked defense counsel why she rejected the AFOSI offer of a test on 24 April at 0800. The defense counsel said she had a pretrial confinement hearing scheduled across town at Lackland Air Force Base for that time, and she was unsure if she would be able to meet and fully discuss the issue with her client. Appellant's counsel failed to show she made any

efforts to reschedule the pretrial confinement hearing, although she received an unspecified "representation" that the magistrate was only available on that date. Other than a vague reference to her preference not to send her client alone to the polygraph examination, appellant's counsel provided no good rationale, under the circumstances, for not permitting AFOSI to conduct the test without counsel present and without the possibility of a post-test interview. The military judge denied this request for a continuance.

II. Denial of Request for Continuance

A military judge may grant a continuance to any party, for reasonable cause, for such time as may appear to be just. Article 40, UCMJ, Granting a continuance is within the discretion of the military judge, and a denial of such request will be reversed only for an abuse of discretion. *United States v. Sharp,* __ M.J. __ (C.M.A. 1993); *United States v. Menoken,* 14 M.J. 10, 11 (C.M.A. 1982). To find the military judge abused his discretion requires more than a difference of opinion on the ruling. In order to reverse for an abuse of discretion, we must find the military judge's decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Travers,* 25 M.J. 61, 62 (C.M.A. 1987). Here, appellant was given the opportunity to take another Government polygraph exam before trial. Although the situation may not have been ideal for the defense, appellant failed to show adequate cause for rejecting the offer. Under these circumstances, we find the military judge's decision was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. He did not abuse his discretion.

III. Mil. R. Evid. 707

Mil. R. Evid. 707 prohibits the admission into evidence of the results of a polygraph examination and the opinion

of a polygrapher. Appellant claims this rule is an unconstitutional denial of her Sixth Amendment right to compulsory process, her Fifth Amendment right to due process of law, and her right to exculpatory evidence which could have been used outside the trial forum.

Appellate courts historically have been reluctant to decide issues which, while interesting and important, are not ripe for judicial review. *United States v. Jones,* 26 M.J. 632 (A.F.C.M.R.1988), *vacated,* 28 M.J. 94 (C.M.A. 1989); *United States v. Landes,* 17 M.J. 1092, 1093 (A.F.C.M.R. 1984). On the record before us, the constitutionality of Mil. R. Evid. 707 is not ripe for review.

Appellant offered no exculpatory polygraph for admission into evidence; she merely asked for a continuance so she could obtain one. Whether any resulting polygraph would have been exculpatory is entirely speculative. The military judge made no findings or rulings upon the admission of a particular polygraph result. Thus, there is no record upon which this court can decide the issue. As noted above, the Government offered appellant the opportunity to take a second polygraph. Appellant failed to take advantage of that offer, knowing that she would be unable to get another examination before trial, and apparently, without making any effort to rearrange her schedule to meet that of the AFOSI polygrapher. Since the appellant did not, and from the record apparently still does not, have an exculpatory polygraph examination to present for admission, we believe the issue is not ripe for review.

IV. The Remand

This case originally arrived at this Court for statutory review on 17 July 1992. In accordance with Rule 15(c) of

the Rules of Practice and Procedure, Courts of Military Review (22 M.J. CXXVII, CXXXII (1985)), appellant had 30 days in which to file any assignments of error and briefs with this Court. On 11 August 1992, appellant's appellate counsel requested an enlargement of time until 18 September 1992 to provide "sufficient opportunity to completely review and research the issues raised by this record of trial." We granted that request. On 18 August 1992, appellate defense counsel submitted the record of trial to this court without assignment of error. After our decision approving the findings and sentence, appellate defense counsel raised before the Court of Military Appeals the two issues which are the subject of this remand. There is no explanation in the record as to why, if appellate defense counsel thought these errors had merit, they failed to submit them to this Court during our initial review of the case. The brief was not due for another month, and appellate counsel are well aware of our very liberal policy in granting additional enlargements of time.

By remanding to this Court, the Court of Military Appeals elected to relieve appellant of the consequences of her failure to comply with the rules of procedure established by The Judge Advocates General under Article 66(f), UCMJ, which require the timely filing of issues before this Court. We believe this practice is ill advised when, as in this case, there is no evidence that we failed to fulfill our statutory duties under Article 66(c), UCMJ, and appellant has failed to show good cause. When the Court of Military Appeals permits appellants to raise issues for the first time before them without requiring a showing of good cause, and returns the case for us to repeat our review of the case, it impeaches confidence in this Court's performance of its statutory duties and provides incentive to appellate counsel to submit issues piecemeal. This does

an injustice to this appellant, whose case has been delayed over a year, and to other appellants whose cases, properly before us, are delayed while we give priority to the remand. The Court of Military Appeals should require appellants to show good cause before permitting issues to be raised for the first time at that Court.

The findings and sentence are correct in law and fact; and no error prejudicial to the substantial rights of appellant was committed. Articles 59(a), 66(c), UCMJ. Accordingly, the findings and approved sentence are

AFFIRMED.

Senior Judge JOHNSON and Judge HEIMBURG concur.

[Seal Omitted]

/s/ Naomi D. Williams
NAOMI D. WILLIAMS
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 93-0089/AF
CMR Dkt. No. S28688

UNITED STATES, APPELLEE

v.

JANIET L. HEYWARD (267-33-8790), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, we note that appellate defense counsel, in his Supplement to Petition for Grant of Review dated February 1, 1993, has for the first time on appeal raised the issue whether Mil. R. Evid. 707, Manual for Courts-Martial, United States, 1984, which excludes polygraph evidence, violates an accused's rights to due process of law under the Fifth Amendment; and whether the military judge's decision to deny appellant's continuance based solely upon Mil. R. Evid. 707 deprived her of exculpatory evidence which could have been effectively used outside the trial forum. In view of the fact that these issues raised by appellate defense counsel were not before the Court of Military Review in its initial consideration of this case, it is by the Court this 22nd day of June, 1993,

ORDERED:

That the decision of the United States Air Force Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the issues raised for the first time before us. Following these proceedings, Article 67(a), Uniform Code of Military Justice, 10 USC § 867(a) (1989), will apply.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (PARKS)
Appellate Government Counsel (McDADE)

APPENDIX D

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM S28688

UNITED STATES

v.

STAFF SERGEANT JANIET L. HEYWARD FR267-33-8790
UNITED STATES AIR FORCE

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23 September 1992

Sentence adjudged 30 April 1992 by SPCM convened at Kelly Air Force Base, Texas. Military Judge: Wade B. Morrison (sitting alone).

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Major Mary C. Yastishock, Major John V. Sullivan, and Captain Marc A. Fox.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

PER CURIAM:

The approved findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

[Seal Omitted]

/s/ Nancy Howell
NANCY HOWELL
Document Examiner
Court of Military Review

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